

CENEX, INC.

IBLA 96-53 Decided August 26, 1998

Appeal from a determination of the Associate Director, Minerals Management Service, upholding assessment of additional payments for purchases of royalty-in-kind crude oil. MMS-92-0035-0&G, MMS-92-0222-0&G.

Affirmed.

1. Accounts: Payments—Administrative Authority: Generally—Oil Gas Leases:
 Royalties: Payments—Statute of Limitations

An MMS order assessing additional payments for purchases of royalty-in-kind crude oil delivered, but not billed, under a royalty-in-kind contract is not barred by the statute of limitations found at 28 U.S.C. § 2415(a) (1994) because, although the statute establishes time limits for commencement of judicial actions for damages on behalf of the United States, it does not limit administrative proceedings within the Department of the Interior.

APPEARANCES: Gary G. Broeder, Esq., Billings, Montana, for Cenex, Inc.; Peter J. Schaumberg, Esq., Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

CENEX, INC., f/k/a Farmer's Union Central Exchange, Inc. (Cenex), has appealed from a determination of the Associate Director for Policy and Management Improvement, Minerals Management Service (MMS), issued on July 27, 1995, upholding two MMS orders. In the first order, dated December 16, 1991, MMS had demanded a royalty-in-kind (RIK) payment of \$108,472.76 based on alleged royalty underpayments (F.B.I.L. No. 24924004) and, in the second order, dated April 16, 1992, demanded interest on the RIK underpayment in the amount of \$196,872.66 (F.B.I.L. No. 24924510).

The essential facts are undisputed. Effective June 1, 1980, the United States elected to take its RIK for oil production from the Elk Basin Unit, operated by Amoco Production Company. MMS negotiated RIK Contract

No. 14-08-0001-18185 with Cenex pursuant to section 36 of the Mineral Leasing Act of February 25, 1920, as amended, 30 U.S.C. § 192 (1994). The original term of the contract ran from June 1, 1980, through June 1, 1983, but was extended from June 1, 1983 to March 1, 1984. Pursuant to the terms of the RIK contract, the Government delivered royalty oil to Cenex and Cenex paid the Government by check or draft on a monthly basis for such oil on or before the last day of the calendar month following the calendar month in which the delivery of the royalty oil was made by the Government. Cenex's payments were made in accordance with monthly billings received from the MMS. These billings were in turn based on the unit operator's report of production volumes.

During the late 1980's, pursuant to section 205 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1735 (1994), the Montana Department of Revenue conducted an audit of the Montana leases in the Elk Basin Unit, including the instant lease. 1/ The State determined that, in 23 of the 34 months between February 1981 and November 1983, Cenex had been underbilled for the volumes of oil delivered to Cenex from the Embar-Tensleep participating areas. The audit attributed the underbilling and concomitant underpayment of royalties to Amoco's erroneous reporting of production volume and well count information to MMS. Demand was made to Cenex to make up the billing shortfall. Cenex ultimately complied, though under protest. Thereafter, MMS assessed interest on the late payments, which assessment Cenex also appealed.

Cenex did not dispute that it, as the RIK purchaser, had actually received the additional volumes of RIK crude oil represented by the \$108,472.76 assessment in MMS' December 16, 1991, order. Rather, Cenex sought to avoid liability therefor on the ground that MMS' claim was barred by the 6-year statute of limitations contained in 28 U.S.C. § 2415(a) (1994). Noting that the last payment for which increased royalties were sought was due no later than December 31, 1983, Cenex argued that the Government was obligated to initiate proceedings to recover the alleged underpayment no later than December 31, 1989, which it did not do. In the decision under review, the Associate Director rejected Cenex's argument and held that the statute of limitations does not apply to administrative determinations concerning the amount of money owing to the Federal Government.

On appeal, Cenex reiterates the argument it made to MMS that the Government's claim is barred by the statute of limitations. 2/

1/ The Elk Basin Unit, operated by Amoco Production Company, embraces lands in both Wyoming and Montana. The RIK crude oil delivered to Cenex in this case was delivered from the Embar-Tensleep Participating Area of the Elk Basin Unit.

2/ We note that, in its Statement of Reasons, Cenex raises for the first time a challenge to the assessment on the grounds of estoppel and laches. Regardless of the ultimate enforceability of any administrative determination that Cenex owes additional royalties, we would remind Cenex that

Specifically, Cenex relies upon the Tenth Circuit decision in Phillips Petroleum Co. v. Lujan, 4 F.3d. 858 (1993), which held that the right of action accrues and the statute of limitations begins to run on the date that royalties were due, but that the statute of limitations would be tolled until completion of an audit where facts material to the Government's right of action could not reasonably have been known without an audit and the audit was completed within a reasonable time after the deficient payments. Specifically, Cenex relies on the court's holding that, unless the audit is commenced within 6 years of the date that the records delineating the deficient payment are generated, the delay in commencing the audit is per se unreasonable. Id. at 863-64.

Applying the court's standards, Cenex argues that, under the facts of this case, the statute of limitations was not tolled. Thus, it notes that the audit did not even commence until October 23, 1989, more than 6 years after all but the payments due no later than October 31, November 30, and December 31, 1983. Moreover, Cenex points out that the audit letter advised Cenex that the audit would cover the period from November 1, 1984, through October 31, 1989, and that it was not until 1991 that Cenex was informed that previous payments had been audited. Finally, Cenex notes that, in any event, since the payments were made in reliance upon billings made by the Government which were themselves incorrect, through no fault of Cenex, the Government cannot establish that the facts material to its right of action could not reasonably have been known at the time the alleged underpayments occurred. For all of these reasons, Cenex seeks to have this Board rule that the action to recover alleged underpayments and the interest thereon is barred by the statute of limitations.

[1] Notwithstanding the foregoing, we must affirm the MMS decision. The applicable statute 3/ provides:

Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for

fn. 2 (continued)

application of both estoppel and laches is premised on a lack of knowledge of the true facts in the party seeking to invoke these equitable remedies. See generally, Ptarmigan Co., 91 IBLA 113, 116 (1986), aff'd sub nom. Bolt v. United States, 944 F.2d 603 (9th Cir. 1991). In point of fact, Cenex has never once challenged the MMS claim that it received more oil from Amoco than it paid for or asserted that it was not aware of exactly how much oil it had received. Its attempt to invoke either estoppel or laches is properly rejected.

3/ While we recognize that section 115(b)(1) of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, 110 Stat. 1705, 30 U.S.C.A. § 1724(b)(1) (1998), established a requirement that any judicial proceeding or demand which arises from an obligation be commenced within 7 years from the date that such obligation becomes due, this provision applies only with respect to royalty obligations which became due after August 1996. See 30 U.S.C.A. § 1701, note (1998).

money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or law, whichever is later * * *.

28 U.S.C. § 2415(a) (1994). In U.S. Oil and Refining Co., 137 IBLA 223, 230 (1996), we reiterated the Board's consistent holding that statutes of limitation, like 28 U.S.C. § 2415(e), which establish time deadlines for the commencement of a judicial action for damages on behalf of the United States, are not applicable to administrative proceedings within the Department of the Interior which are conducted for the purpose of determining liability and fixing the amount which the Government claims to be due. See also W.A. Moncrief, 144 IBLA 13, 15-16 (1998); Trigg Drilling Co., 138 IBLA 375, 377 (1997); Texaco Exploration and Production Inc., 134 IBLA 267, 270 (1995); Texaco Inc., 134 IBLA 109, 116 (1995).

Similarly, we are without any authority to determine whether the statute of limitations would bar a judicial suit to collect underpayments of RIK oil. Such a determination is properly made by a court of competent jurisdiction before which any collection proceeding is brought. U.S. Oil and Refining Co., *supra*, at 231; Texaco, Inc., *supra*, at 117; Marathon Oil Co., 119 IBLA 345, 352 (1991). Moreover, since a statute of limitations is an affirmative defense and must be pled (*see, e.g., American National Bank v. FDIC*, 710 F.2d 1528, 1537-39 (11th Cir. 1983)), we will not foreclose the possibility that, through intention or inadvertence, Cenex might fail to even raise the statute.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

T. Britt Price
Administrative Judge

